IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 21

RAY BROOKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE

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Interest of Amici Curiae

The American Federation of Labor and the Congress of Industrial Organizations together are federations of unions representing approximately sixteen million employees. These unions are repeatedly confronted with the problem faced by the International Association of Machinists, District Lodge No. 727, in the case at bar, namely, whether an employer can ignore a Board certification, issued after a secret ballot election, because of a claimed repudiation of the union, as evidenced by a petition or similar non-secret poll of the employees. Indeed, in this and most of the cases hereinafter cited, the unions which had obtained certifications from the National Labor Relations Board, only to be met with employer claims that the union had subsequently

lost its majority, were affiliates of the A. F. of L. or the C.I.O.

Reason for Filing This Brief

We believe that the Board in the instant case properly ordered the employer to bargain collectively with the union and we argue, therefore, in support of the judgment below as does the Board. This brief is not being filed, however, merely to "back-stop" the Board or to repeat arguments made by it. It is filed because examination of the Board's brief by counsel for the A. F. of L. and the C.I.O. after it was filed disclosed, for the first time, that the Board was not resting its case in this Court upon what we believe are the relevant provisions of the Act and that therefore an important question of law raised by the facts of the case was not adequately, or indeed at all, presented by the parties. This brief represents an effort to set forth this unargued question and the reasons why we believe that it should be the basis for decision in this case. The brief is filed with the consent of the parties.

The Question of Law Which Is Not Presented by the Parties

In this case an election was conducted by the Board in which a majority of the employees in the appropriate bargaining unit selected a union as their bargaining representative. A week after the election was held a document was presented, signed by a majority of the employees, stating that they did not wish the union to represent them; the employer thereupon refused to deal with the union.

The "single question" (Bd. Brief, p. 12) presented by these facts, according to the Board, is whether the employer was required to bargain collectively with the union "despite this repudiation of the union by the employees." (Bd. Brief, p. 2.) The Board argues at length that a reasonable compromise between the desirability of giving effect to the wishes of the employees and the necessity for stability in industrial relations requires that for a "reason-

able period" of time the employer should not be entitled to refuse to bargain because of a change in employee sentiment. Many cases, most of them prior to the 1947 amendments, are cited in support of this "reasonable period" rule and it is argued that the rule was recognized and confirmed by the 1947 amendments to the Act.

The Board's brief makes only incidental reference to one of the fundamental changes in the Act made by the 1947 amendments: the specific provision in Section 9(c) of a procedure for revoking a certification by holding an election in which employees who wish to repudiate the union which they have previously chosen may obtain a secret ballot election with all of the safeguards which were contained in the original selection of the union.[1] The Board's brief makes no reference at all to *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563 (1950), in which this Court construed these new provisions as providing the exclusive method for attacking a Board certification and said that any attempt to claim a loss of majority status in an enforcement proceeding "subverts the statutory mandate to leave these matters to the Board in separate proceedings under §9(c)." *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. at 568 (emphasis added).

The question which the Board presents is whether, when a union has been certified after a secret ballot election under Section 9(c), an employer is precluded for a reasonable period of time from relying on a shift in employee sentiment as a justification for refusing to bargain. The question which we believe is presented by this case is whether, under those same circumstances, the employer is required to bargain with the certified union until it is shown by the secret ballot vote which is now also provided for in Section 9(c) as a method of decertification, that the employees no longer

[1] Indeed, in stating that "the device of the 'recall' has not yet become established in our political or social structure" (Bd. Brief, p. 39) the Board seems to assume that there is no such decertification procedure.

wish the union to represent them.[2] To put the matter in other words, the Board in its argument here, although not in its formal decision[3] assumes that the document signed by the employees in this case is a reliable reflection of their desires with respect to the union and then poses the question of whether the Board and the courts should give effect to those desires. The question which we assert is presented is whether the document presented in this case, or any other method of expression of opinion other than the secret ballot election, provided for by the Act, can be regarded as competent evidence of the employees' desire to repudiate a union which they have just chosen in a secret ballot.

SUMMARY OF ARGUMENT

1. The amended Act provides that any time after the end of one year a certification of a union may be challenged in election proceedings instituted by employees or another union either to change representatives or to decertify the union. By providing only this one method for terminating a certification Congress has excluded other methods. An employer accordingly is under a duty to bargain with a certified union until the certification is revoked by Board decertification or by Board certification of another union.

2. The legislative history of the decertification provision of the amended Act establishes that Congress was dissatisfied with the Board's previous handling of the problem of alleged losses of majority and that Congress desired to

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[2] The reason that the Board has put the question in the way it has may be due to the assumed necessity of justifying the decision in *Matter of Celanese Corporation of America*, 95 NLRB 664 (1951). For the reasons set forth hereinafter we believe that reasoning of the Board is erroneous.

[3] The Board's decision, 98 NLRB 976, adopted the Trial Examiner's Intermediate Report which relied in part (R. 14-16) on the absence of proof as to the signatures on the repudiation petition as highlighting "the Board's policy in attributing such great weight to the desires of employees when expressed in the privacy of the voting booth." 96 NLRB at 982.

institute a change. Sponsors of the decertification procedure believed that, without this procedure, employees could never rid themselves of a union except by choosing a new union. The sponsors intended that the new decertification election procedure should provide the exclusive exception to the previous inability to terminate a certification without choosing a new union.

3. This Court and the United States Courts of Appeals for the Fourth, Fifth and Seventh Circuits have construed the decertification provision of the amended Act as depriving employers of any standing to challenge a union's continued representative status except by filing a petition for an election. As a necessary corrollary it follows that the employer must respect a certification until it has been revoked in a decertification election or another union certified.

4. According a certification continued validity until it is revoked by Board decertification or by certification of another union affords a fair and workable system of collective bargaining. It eliminates the uncertainty inherent in the Board's suggested system. It eliminates the temptation to employers to encourage informal repudiations of the union which the Board's system invites.

ARGUMENT

I. The plain provisions of the National Labor Relations Act, as amended, impose upon an employer the duty to bargain collectively with a certified union until the certification is revoked by Board decertification or by Board certification of another union.

The application of accepted rules of statutory construction to the 1947 amendments to the National Labor Relations Act requires the conclusion that Congress intended that once a union has established its majority designation in a Board conducted election the union's status should continue until another majority choice, either of no union or of another union, is registered in another Board conducted

election. This follows from the fact that the amended Act not only provides a specific method for decertifying a union, namely, by an election conducted by the Board, but also contains certain limitations which must be met before this method can be utilized. The Congressional purpose in setting forth these limitations would be frustrated if another method of decertification were permitted.

The pertinent provisions of the Act are in Section 9(c) of the Act and (reparagraphed for clarity) read as follows:

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees

(i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or

(ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

Examination of these provisions and comparison with the provisions of Section 9(c) of the Act prior to amendment (49 Stat. 453, 29 U. S. C. (1946 ed.) 159) discloses the following significant points:

(1) Election by secret ballot is required in all cases by the amended Act, while under the original Act certification could be made by the Board after utilization of "any other suitable method."

(2) The original Act covered all cases in which "a question concerning the representation of employees" arose. The Board, however, would only entertain petitions for certification filed by a union or employer petitions where two or more unions were making mutually exclusive claims for recognition. *Tabardrey Manufacturing Co.*, 51 NLRB 246. See S. Rept. No. 105 on S. 1126, 80th Cong., 1st Sess., 10-11 (1947). Under the amended Act, employees can file petitions asking for the decertification of a union which has previously been certified or recognized by the employer. Furthermore, employer petitions can be filed when "one or more" organizations have claimed to be the collective bargaining representative of the employees.

(3) Under both Acts, the Board is not required to act unless it finds that a "question of representation" exists. The amended Act did not, therefore, impair the Board's discretion to dismiss petitions "where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate." *Id.* at 11.

(4) Under the amended Act, an election cannot be held on either a certification or a decertification petition until one year has elapsed since the last valid election within the bargaining unit. The "reasonable period" rule which the Board had developed under the original Act was thus not only recognized and approved but, in fact, firmly written into the statute as a limitation on the holding of elections.

These four points taken together mean that if a substantial number of employees wish to repudiate a union which

they have chosen in a secret ballot election they can accomplish this by filing a petition with the Board. If the Board finds that there is a question of representation and that there is no outstanding contract or other special condition, and if no election has been conducted for a year, then the Board can proceed to ascertain the wishes of all of the employees in the unit. But it must do so, not by a "suitable method" but by "an election by secret ballot."

Every consideration which led Congress to specify these terms and conditions for a decertification petition would also require, we submit, that the result of decertification—the termination of the employer's duty to bargain—cannot be achieved except through the method provided in the Act.

II. The legislative history of the decertification provision of the National Labor Relations Act, as amended, shows that Congress intended that this decertification procedure should provide the exclusive method for repudiating a certified union.

In order to give proper recognition to the intention of Congress in making the 1947 amendments to Section 9(c) it is necessary to examine the prior law and to unscramble some history which the Board's brief has, we believe, confused.

The original National Labor Relations Act, as well as its precursor, the Railway Labor Act of 1926, and the amendments thereto of 1934, made no specific provision for decertification of unions. And under neither Act were unions decertified. Indeed from 1926 to date, under the Railway Labor Act as interpreted and applied by the National Mediation Board, by the carriers and by unions, once a union has been certified it is impossible for the employees thereafter to assume an unorganized state unless the certified union voluntarily relinquishes its bargaining status and no other union claims recognition. A certified union continues to hold its status indefinitely and only by selecting

another union can that status be lost involuntarily.[4] In *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548 (1930), a case arising under the Railway Labor Act of 1926, this Court affirmed a court decree which required the carrier to recognize the Brotherhood as the representative of its clerical employees until such time as these employees by a secret ballot taken in accordance with the further direction of the Court should choose other representatives (281 U. S. at 557).

The old National Labor Relations Board, operating under Public Resolution No. 44, 73d Cong. (H. J. Res. 375), expressly followed the analogy of the *Texas & New Orleans* decree and issued its bargaining orders in terms which required bargaining with the certified union until some other representative should be chosen in a Board conducted election. *Matter of North Carolina Granite Corp.*, 1 (old) NLRB 89, 92 (1934). Similarly in *Matter of International Association of Oil Field, Gas Well and Refinery Workers and Lion Oil Refining Co.*, Dec. Petroleum Labor Policy Bd. 34, 37 (1934), it was held that certification based on a Board election could only be terminated by the rejection of the union in another Board election.

During the hearings and debates which preceded the original National Labor Relations Act, Senator Wagner repeatedly referred to this aspect of the *Texas & New Orleans* decree.[5]

Under the original National Labor Relations Act, it was established by decisions of this and other courts that once a union had established its majority, it must be recognized

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[4] We know of no printed source for this information respecting this practice under the Railway Labor Act but the practice is well known and accepted in the railroad field, and counsel for *amici curiae* have confirmed this information by calling the office of the Executive Secretary of the National Mediation Board.

[5] Hearings before Committee on Education and Labor, Senate, on S. 1958, 74th Cong., 1st Sess., pp. 52-53; Hearings before Committee on Labor, House, on H. R. 6288, 74th Cong., 1st Sess., pp. 21-22; 79 Cong. Rec. 7571.

until the Board made a new determination of bargaining agent. In *Franks Bros. Co. v. NLRB*, 321 U. S. 702, 705 (1944), the language repeatedly quoted in the Board's brief here (Bd. Br., pp. 9, 25, 33-34), as showing approval of the Board's fixing of a reasonable time for the duration of a certificate, when read in context, refers not to the termination of the employer's duty to bargain but, rather, to the Board's right to defer for a reasonable period a new determination of representatives by it. The duration of the union's status was not merely for the reasonable period but rather until the Board in appropriate proceedings determined that there was a change in bargaining agents. Thus this Court there said (321 U. S. at 705-706):

> "* * * But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. *See National Labor Relations Board* v. *Appalachian Power Co.*, 140 F. 2d 217, 220-222; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881-882. *After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. Id.; see 29 U.S.C. § 159 (c).*" (Emphasis added.)

The decision in *NLRB* v. *Botany Mills*, 133 F. 2d 876 (C. A. 3, 1943), certiorari denied 319 U. S. 751, cited in the above quoted portion of this Court's opinion, likewise clearly fixes the duration of a certification as having a terminal point only upon the Board certification of a change in majority designation. There the Court of Appeals for the Third Circuit said (at pp. 881-882):

> "* * * The Board was empowered by the statute to make rules and regulations for its procedure for the same reason. The Board has within its authority power to ascertain the will of the majority of a given group of employees by election or other means. The election method is chosen, we take it, because secret

> ballot is regarded as the most effective way of getting an untrammeled expression of the desire of the electorate. Surely it is not to be defeated of all its effectiveness by a communication, undisclosed to the Board, repudiating, immediately after the election was held, the ballot count. The employees in this case, if they wished to change their minds concerning a bargaining agent, could have asked the Board for another election. If the Board had arbitrarily refused it within a reasonable time then we might have a case where a question could be raised whether it had done its duty under the statute. * * *"

The courts subsequent to the *Franks* decision and prior to the 1947 amendments, read the *Franks* decision as requiring that a Board certification be honored until the Board certified a change. Thus see *NLRB* v. *Prudential Insurance Co.*, 154 F. 2d 385, 390 (C. A. 6, 1946) where the Court of Appeals for the Sixth Circuit said:

> "* * * Until such changed conditions are reflected by a later ruling of the Board, or by arbitrary refusal to act after a reasonable time, a valid existing certification must be honored. The respondent had no right to make the ruling that changed conditions invalidating the existing certification, such right being exclusively in the Board. *Franks Bros.* v. *N.L.R.B., supra; N.L.R.B.* v. *Appalachian Electric Power Co., supra.*"

These decisions were severely criticized by law review commentators and text writers on the ground that the Board construed the Act as not authorizing decertification proceedings. It was therefore urged the Act should be amended to provide for decertification elections. A note on *NLRB* v. *Appalachian Electric Power Co.*, 140 F. 2d 217 (C. A. 4, 1944) entitled "Duty of Employer Who Had Committed No Unfair Labor Practice to Bargain with Certified Union after Employees Have Revoked Designation of Union as Their Bargaining Agent," 30 Va. Law Rev. 344, 345-346 (March, 1944) states:

> "* * * the instant case does not seem to permit re-

fusal to bargain until the Board itself takes action, through a formal redetermination of majority status. * * *

"In order to balance the desirability of stability in bargaining with the employees' freedom of choice of representatives, the Board refuses to entertain representation petitions within a reasonable period after an election. *Matter of Century Oxford Mfg. Corp.*, 47 NLRB No. 103 (1943). For administrative reasons, the minimum reasonable time is one year. See *Matter of Monarch Aluminum Mfg. Co.*, 38 NLRB 404 (1943). Non-union employees cannot petition for a redetermination of a union's majority status. *Matter of Tabardrey Mfg. Co.*, 51 NLRB No. 54 (1942). Thus it would appear that as a result of the decision in the instant case the Board hereafter will not entertain for at least a year a claim by the employer that the union does not represent the will of a majority of the workers and not even then unless the workers who have repudiated the existing union form or join another union. * * *"

Similarly see Iserman, Industrial Peace and the Wagner Act (1947), pp. 28-29:

"*Unions Given Long-Lasting Control.* Once a group of employees has become subject to control by a union through its right to bargain for them as their exclusive agent, it is hard for them to escape that control. Ordinarily, they do not succeed without finding themselves subject to control by another. This tends to keep up membership in the union movement but to limit the freedom of workers to choose whether to bargain for themselves or to subject themselves to the power of a union as their exclusive bargaining agent.

"Employees subject to unions as their exclusive bargaining agents under the Act sometimes have found the benefits they hoped for not forthcoming, or that the union neglected them or that what it exacted from them in one form or another was more than the benefits they received.

"The Act would seem designed to provide for employees in such a case applying to the Board for relief. It says the Board shall act whenever a question affect-

ing commerce arises concerning the representation of employees. But under this clause, the Board acts only to determine whether employees wish a union to represent them, not to determine whether they do not wish a union to represent them. Either question seems to be one 'concerning representation,' but the Board says it will 'pay no heed to employees' petitions' in the latter case.

"Apparently the only way employees can escape a union's control over them once it has become their exclusive bargaining agent is to subject themselves to control by another union and get it to apply for an election. Even then, the Board may deny the request.[9] The Board seems to be moving in the direction of restricting more and more the freedom of employees, making it harder and harder for them to rid themselves of control by a union once they have given it power over them.[10]

"Were employees to ask their employer to deal with them and not with the union certified as their bargaining agent, on the ground that the union no longer represented the majority, and were the employer to grant that request, the Board at the request of the certified union probably would find the employer guilty of an unfair labor practice. If the employer finds this risk too great to run, the employees are helpless.

"[9] *Matter of Electric Sprayit Company*, 67 N.L.R.B. No. 161 (1946); *Matter of Aluminum Company of America*, 57 N.L.R.B. 913 (1944); *Matter of Bohn Aluminum & Brass Corp.*, 57 N.L.R.B. 1684 (1944); *Matter of Kennecott Copper Corp.*, 51 N.L.R.B. 1140 (1943); *Matter of E. T. Fraim Lock Co.*, 24 N.L.R.B. 1190 (1940); *Matter of Forrest City Cotton Oil Mill*, 48 N.L.R.B. 90 (1943); *Reilly* v. *Millis*, 144 Fed. (2d) 259 (Ct. App., D. C., 1944), cert. denied in 325 U. S. 879 (1945).

"[10] See: *Matter of Midwest Piping Co.*, 63 N.L.R.B. 1060 (1945); *Matter of Mississippi Lime Company*, 71 N.L.R.B. No. 71 (1946); *Matter of General Electric X-Ray Corp.*, 67 N.L.R.B. No. 121 (1946); *Matter of Northwestern Publishing Company*, 71 N.L.R.B. No. 20 (1946)."

During the hearings that preceded adoption of the 1947 amendments of the Act these criticisms were voiced repeatedly as the basis for urging that the Board be required to hold decertification elections. Jerome V. Morrison, the

president of an employer company which had been ordered to bargain with a union despite repeated petitions signed by a majority of employees repudiating the union, described his experiences with the Board. He did not argue that employers should be allowed to judge for themselves the validity of such petitions, as the employer does here, but merely urged that the Act should be amended to afford employees a procedure for checking by a secret election conducted by the Board whether a majority continued to desire union representation. The pertinent part of his recommendation is as follows:[6]

> "Mr. Barela explained to me that the petitions of our employees were of no value because they did not come from a union demanding to represent the employees in collective bargaining. * * *
>
> "* * * To me, gentlemen, this means that the National Labor Relations Board will do everything it can to get employees into a union and to get a union into a plant, but when the employees want to get out of the union, the Board will not even listen to them.
>
> "* * * on July 9, 1946, we asked the National Labor Relations Board for a review and a decision. We received their answer on July 23 when they denied our request.
>
> "This left the union in possession of the legal right to represent all of our employees in spite of the fact that a majority had twice petitioned, saying they no longer wanted to be represented by this union. I want to say to your committee that this situation is the direct result of two things that Congress should correct:
>
> "1. As the law now stands, members can choose a union to represent them, but once having done so, they cannot choose to drop the union and to deal individually with the employer.
>
> "2. Under the law, the employer can ask for an election only if two or more unions are involved. Our case was clearly one where the question was not between two unions, but was whether a majority of our employees

[6] Hearings before Committee on Education and Labor, House, 80th Cong., 1st Sess., vol. 2, pp. 245-246.

wanted to deal through a union or to deal without a union.

"I suggest to your committee that the law should be corrected so that employees have the right to disavow a union, just as they now have the right to choose one. It should also be corrected so that when there is an honest question as to the wishes of the employees there can be a secret election held to permit them to express their desires and that it should not be limited to a fight between two unions.

"It seems to me also that in spite of the weaknesses in the present law much of the trouble in our case came from bad administration of the law by the National Labor Relations Board. Our lawyers tell us that although the Wagner Act does not specifically provide a way for the employees to disavow a union, neither does it prohibit the Board from holding an election for this purpose. If the Board were not definitely pro-union, it seems to me that they would have been glad to give our employees the right to express their wishes in a democratic American way."

Similarly, Theodore R. Iserman, attorney for various employers, whose text criticizing the Board has already been quoted, testified:[7]

"5. Once the Board has certified a union as bargaining agent for a group of employees, it is virtually impossible for the employees to escape control by that union without subjecting themselves to control by another.

"The Board says it will 'pay no heed' to petitions by workers to have certifications withdrawn or revoked. Congress should compel the Board to accept such petitions and to act upon them without in any way discriminating against the petitions or against the people filing them.

"There should be a provision in the act that permits employees to petition the Board for decertification of

[7] Hearings before Committee on Labor, House, 80th Cong., 1st Sess., p. 2724; see also Hearings before Committee on Labor and Public Welfare, Senate, 80th Cong., 1st Sess., on S. 55, Pt. I, pp. 154-156.

> unions. I have four plants in which the employees have bargaining agents under the Wagner Act. In all four plants, they do not want the bargaining agents any more, but the only way they can get rid of them is to get another bargaining agent."

Instead of urging decertification elections two witnesses appearing before congressional committees, urged periodic elections—annually or biennially—to redetermine representatives.[8]

It is in the light of this state of the law and of this kind of criticism that the legislative action of 1947 must be viewed. That action itself confirms the view that Congress recognized the earlier cases as establishing a certified union's status until another Board election was conducted and that decertification was provided as the exclusive method of repudiating a certified union.

The House Report on the bill which became the 1947 amendments to the Act stated:[9]

> "Although the terms of the act would permit them to do so, the Board has denied to employees who have designated an exclusive representative the right to have it decertified unless, at the same time, they subject themselves to control by another representative. The bill restores to employees this right of which the Board deprived them. If they engage in collective bargaining through an exclusive representative and the experience proves disappointing, 30 per cent of them can ask for an election in which the majority can withdraw their designation of the representative."

The bill which passed the House, as the Board points out in its brief, differed from the bill finally enacted in that it not only provided for decertification elections, but also exempted these elections from the proposed provision for-

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[8] Statement of Paul S. Chalfant, Hearings House Committee, *op cit*, pp. 2618-2619; Statement of Charles S. Craigmile, Hearings Senate Committee, *op cit*, p. 517.

[9] H. Rep. 245, 80th Cong., 1st Sess., on H. R. 3020, p. 35.

bidding elections more frequently than once a year. H. R. 3020, 80th Cong., 1st Sess., Secs. 9(f)(7), 9(c)(2). As the Board also points out (Bd. Br., pp. 43-44), this exception was subject to severe criticism. The Senate bill did not contain it. The Senate provisions, which were finally adopted in conference (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49), set forth the decertification procedure without making any exception to the one-year rule.

Senator Taft stated, with reference to these provisions (93 Cong. Rec. 3838):

> "We provide, further, that there may be an election asked by the men to decertify a particular union. Today if a union is once certified, it is certified forever; there is no machinery by which there can be any decertification of that particular union. An election under this bill may be sought to decertify a union and go back to a nonunion status, if the men so desire.
>
> "* * * The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. The men choose a bargaining agent for one year. *He remains the bargaining agent until the end of that year.*" (Emphasis added.)

The conclusion to be drawn from this history, we think, is that Congress assumed that under the original Act there was no way in which an employer could recognize the desire of his employees to dispense altogether with a certified union representative. When presented with this problem Congress did not attempt to permit employers to go behind the certification or to allow them to recognize employee sentiment expressed in ways other than a Board conducted election, either within a reasonable period or after. It provided, instead, for a decertification procedure. The Board's "reasonable period" rule was embodied in the limitation on the decertification procedure. Those who wished to permit employees to repudiate a chosen union at any time sought to accomplish that result by exempting decertification elections from the one-year rule. Those who, on the other hand,

wished to assure that a bargaining representative would retain that status "until the end of that year" did so by making the one-year rule applicable to decertification proceedings. The implicit assumption of both sides to that controversy, we submit, was that until a decertification election was held the collective bargaining status of the certified union remained in effect. Both houses recognized that only by a secret election could a fair determination be made as to whether the employees desired the certification to continue in effect or to be terminated.

III. This Court and the United States Courts of Appeals for the Fourth, Fifth and Seventh Circuits have construed Section 9(c) of the amended act as providing the sole method of questioning a certified union's continued status as bargaining representative.

In *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563 (1950) a union had been certified in 1944. In 1947 the union filed a charge under Section 10 of the Act complaining that the employer refused to bargain with it. The Board so found. When the Board in 1949 sought enforcement of its resultant order to bargain, the employer sought to have evidence taken as to the union's continued status as the representative of the majority of the employees. This Court held that the taking of such evidence was improper. This result could have been rested on the theory that the employer should have raised the issue as to the union's status in the unfair labor practice proceedings before the Board under §10, a "reasonable period" having elapsed since the certification. But it was not. To the contrary, the Court held that the availability of the "separate" procedures for obtaining a secret ballot under Section 9(c) was the reason why the employer could not raise doubts as the union's status. The Court said (at p. 568):

> "* * * Under 9 (c) of the Act 'an employee or group of employees or any individual or labor organization acting in their behalf' may 'assert that the individual

> or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a) * * *.' §9(c)(1)(A)(ii). Petitions by the employer concerning selection of bargaining representatives are limited to those 'alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a) * * *.' §9(c)(1)(B). To authorize the employer to assert diminution in membership in the certified union in an enforcement proceeding subverts the statutory mandate *to leave these matters to the Board in separate proceedings under §9(c).*" (emphasis added.)

This flat holding that the procedures of Section 9(c) are the exclusive method of resolving doubts as to a certified union's continued status has been followed by the Courts of Appeals for the Fourth, Fifth and Seventh Circuits.

In *NLRB* v. *Sanson Hosiery Mills*, 195 F. 2d 350 (C.A. 5, 1952), certiorari denied, 344 U. S. 863, the union was certified in May of 1947. The employer refused to bargain with the union in November, 1948, claiming, on the basis of a petition, that the union no longer represented a majority. The Board found this a violation of the Act and the Fifth Circuit agreed:

> "* * * Such a certification, when lawfully made, must be respected by the employer until changed conditions are reflected by a later ruling by the Board altering or setting aside the certification. This is true, even though the bargaining agent so designated has lost its majority representation of the employees by reason of the subsequent defection of some of those originally voting for it as their representative. The existing certification must nevertheless be honored until lawfully rescinded." 195 F. 2d at 352.

Again, in *NLRB* v. *Toarmina*, 207 F. 2d 251 (C. A. 5, 1953), the court enforced an order requiring the employer to bargain collectively with a union despite the employer's challenge to the validity of the Board's action in dismissing

decertification proceedings initiated by its employees. The court said (pp. 254-255):

> "* * * When the Board has duly certified a Union, the employer may not thereafter decide for himself that the union has lost its bargaining status and refuse to deal with it further. See also *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702, 64 S. Ct. 817, 88 L. Ed. 1020; *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563, 70 S. Ct. 826, 828, 94 L. Ed. 1067. * * *
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> "* * * It is claimed that the evidence would show that a petition for decertification by a 'vast majority' of the employees was filed and subsequently dismissed by the Board several days before the rendition of its decision on July 27, 1951. However, this circumstance is without significance here as our decision in *NLRB* v. *Sanson Hosiery Mills, supra*, makes it clear that any controversy arising over the employees' petition for a change in their bargaining representative would be one between the bargaining agent and the employees and is wholly extraneous to the issue here presented, which is whether or not the respondents have unjustifiably refused to recognize and deal with the duly certified representative of the employees. This they have done."

The Court of Appeals for the Seventh Circuit has similarly adverted to this Court's decision in *Mexia* and to the absence of any standing in the employer to institute decertification proceedings, as establishing that an employer must honor a certification until revoked at the instance of his employees. *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783, 793-794 (C. A. 7, 1950), certiorari denied, 340 U. S. 930. See also *NLRB* v. *Arnolt Motor Co.*, 173 F. 2d 597, 599 (C. A. 7, 1949); *NLRB* v. *Norfolk Shipbuilding & D. Corp.*, 172 F. 2d 813 (C. A. 4, 1949).

IV. To be fair, simple and workable a system of certification and decertification requires that the employer unquestioningly bargain collectively with a certified union until the certificate is revoked.

Both the construction placed on the Act by the Board

and that urged by us would lead to the same result in the instant case. Under the Board's view, however, the employer's duty to bargain here rests on the Board's decision, in the exercise of its discretion, that the employees should not be permitted to change their minds for a reasonable period. Under our view, it rests on the existence of a certification which must be honored until a shift in employee sentiment is evidenced by another Board-conducted election providing the same safeguards for uncoerced choice that were provided in the first election.

In addition to placing the reason for the result on its proper ground, our view would lead to a much more sensible and much fairer administration of the Act. Enough history is available to permit the categorical statement that some employers will use every device to avoid the duty to bargain collectively which the Act imposes. Adoption of the Board's theory would mean that after a year or some other "reasonable period" had elapsed, an employer could refuse to bargain on the basis of a Gallup poll or some other expression of employee opinion which he regarded as sufficient to raise doubt as to the union's status, even though no employee had filed a decertification petition. In an unfair labor practice proceeding the Board would presumably have to determine whether the doubt was in good faith, whether the poll represented a fair method of ascertaining employee sentiment, and a host of similar questions.[10] Under our view, the obligations of all would be clear—as would be the proper method of obtaining an accurate poll of the employees' views.

Our view further makes sense of the decisions of the Board, cited by it on p. 23 of its brief, which recognize changes in employee sentiment where there has been no

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[10] "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case." *Matter of Celanese Corporation of America*, 95 NLRB 664, 673 (1951).

formal certification since, under our view, the question is not one of enforcing a reasonable period during which employees cannot change their minds but rather one relating to the appropriate method of revoking a formal certification. The cases cited by the Board in footnote 10 of its brief (p. 21) as showing the special circumstances justifying an exception to its "reasonable period" rule are not contrary to our view that the employer must continue to bargain with a certified union until it is decertified. In fact, those cases support our view. All but one are representation cases under Section 9(c) in which the Board, for the reasons stated in the footnote, ordered new secret ballot elections. In only one of the cases—*Henry Heide, Inc.*, 107 NLRB No. 258, 33 LRRM 1347 (February 18, 1954)—did an employer refuse to bargain because of a claim of "special circumstances." In that case the Board rejected the claim. It said:

> "* * * an employer who believes in good faith that unusual circumstances have arisen which require a redetermination of representatives may raise this issue by filing a petition with the Board. But until the Board has administratively decided that the circumstances warrant a formal investigation * * * the employer's duty to meet and confer in good faith with the union continued." 33 LRRM at 1349.

Although there are, so far as we know, no cases which permit an employer to ignore a Board certification because of "special circumstances" our view would not preclude such a result where the situation had so greatly changed as to deprive the certification of any real meaning. Such cases would include defunctness of the certified union or a schism such that the identity of the certified union was in doubt.

Our view, because it eliminates confusion and uncertainty in the great majority of cases, will lead to greater effectuation of the Act's basic purposes. So long as there is doubt as to how a given case will be decided in which an employer sets forth a claim of a shift in employee sentiment, recalcitrant employers will have nothing to lose by encouraging

the circulation of petitions and similar documents. Since these methods create no danger of a vote which can serve to fortify the union's position, they are devices favored by such employers. Whether or not the employers succeed in convincing the Board that they are within some exception to the one year rule or that the doubt of majority raised in their minds before or after the one year was genuine, the employees are in fact deprived of bargaining during the interim. The construction for which we contend, on the other hand, offers greater certainty, predictability, and simplicity and thus eliminates the delays which can themselves destroy collective bargaining.

Most importantly, the construction for which we contend preserves the sanctity of secret elections To allow such elections to be set aside by informal Gallup polls brings elections into disrepute and makes a mockery of the guarantees of the Act.

CONCLUSION

It is respectfully urged that for the reasons hereinabove set forth the judgment below should be affirmed on the ground that a Board certification after a secret ballot election requires the employer to bargain collectively with the union certified until that certificate is revoked under the procedures prescribed in the Act.

Respectfully submitted,

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